Chen Chi Yong v Siti Zaharah Abg Hj Husaini & Ors

HIGH COURT (KUCHING) — SUIT NO 22-90 OF 1997(III/II)
MUHAMMAD KAMIL J
11 APRIL 1998

Civil Procedure *— Affidavits — Cross-examination of deponent to affidavit — Civil servant/deponent appeared to have uttered untruth in sworn affidavit — Whether application to cross-examine should be allowed — Rules of the High Court 1980 O 32*

The plaintiff, an aggrieved civil servant, applied to cross-examine one Hj Zakaria Nyumay ('the deponent') — the Director of the Human Relations Management Department of the State Secretary — on his affidavit in support of the application to strike out the Chairman of the Panel on the Coordination of Performance Appraisal and Salary Progression ('the fourth defendant') from the suit. The deponent had deposed that there was no such post as the fourth defendant but did not name the correct panel that deal with the issue raised by the plaintiff.

Held, allowing the application:

In the light of the evidence before the court, the deponent appeared to have uttered an untruth in his sworn affidavit. Whatever the intention or motive that he might have, it could only be ascertained at the proposed cross-examination (see p 582A–B).

[Bahasa Malaysia summary

Plaintif, seorang kakitangan awam yang terkilan, telah memohon untuk memeriksa balas seorang bernama Hj Zakaria Nyumay ('saksi sumpah') — Pengarah Bahagian Pengurusan Sumber Manusia bagi Setiausaha Negeri — atas afidavitnya menyokong permohonan untuk membatalkan Pengerusi Panel Penyelaras Penilaian Prestasi dan Pergerakan Gaji ('defendan keempat') daripada guaman. Saksi sumpah telah mendepos bahawa tiada jawatan sedemikian sebagai defendan keempat tetapi tidak menamakan panel betul yang menguruskan isu yang ditimbulkan oleh plaintif.

Diputuskan, membenarkan permohonan:

Memandangkan keterangan di hadapan mahkamah, saksi sumpah nampaknya telah melafazkan kenyataan yang tidak benar dalam afidavit bersumpahnya. Biar apa sekalipun tujuan atau motif yang diniatkannya, ia hanya boleh ditentukan di pemeriksaan balas yang dicadangkan (lihat ms 582A–B).]

Notes

For a case on cross-examination of deponent to affidavit, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 244.

Cases referred to

Lee Sew Kai v Menteri Dalam Negeri Malaysia & Ors [1990] 1 MLJ 42 (refd)

Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd [1980] 1 MLJ 189 (refd)

Legislation referred to

Federal Constitution art 132(1)(g)

Rules of the High Court 1980 O 32

Muhammad Kamil J: This is an application dated 28 November 1997 (encl 32) of the plaintiff to cross examine Hj Zakaria Nyumay on his affidavit affirmed on 23 October 1997 in support of the application to strike out the fourth defendant from the suit. The application was made by the first, second, third and fifth defendant. Hj Zakaria is the Director of Human Relations Management Department of the State Secretary. Following the implementation of the SSB (Skim Saraan Baru), the State Secretary has set up at least 15 panels on Coordination of Performance and Salary Progression at various levels, ie ministerial, divisional, departmental and local authority.

I am not prepared to hold that the application to cross-examine Hj Zakaria as being without just cause or motivated by a desire to delay the proceedings or without bona fide or sham or vexatious.

To allow or not to allow the plaintiff's application to cross-examine Hj Zakaria is a matter of court's discretion, based on judicial principles. I am dealing with the merits of the application under O 32 of the Rules of the High Court 1980 and in order to enable me to exercise my discretion with regard to the application, it is necessary for me to see how the proposed cross examination would be relevant to the issue of the application. In *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189, Salleh Abas FCJ (as he then was) at p 190 said:

> It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross examine him is without just cause, vexatious or motivated by desire to delay the proceedings (*Allen v Allen* [1894] P 239).

See also *Lee Sew Kai v Menteri Dalam Negeri Malaysia & Ors* [1990] 1 MLJ 42.

Under art 132(1)(g) of the Federal Constitution, public service includes the public service of each State. The Federal Service Circular No 4/92 regulates the services and conduct of the public service, and in a State, the State Government may adopt the Service Circular No 4/92, with or without modification, and it binds the State once it is so accepted.

Under the State Constitution, the executive power of the State is exercised by the Chief Minister or Menteri Besar. The office of the Chief Minister or of the Menteri Besar, as the case may be, is backed up by a body of civil servants, who are members of the public service. This body

of civil servants is headed by the State Secretary, who is answerable to the office of the Chief Minister. In practice, all administrative actions are carried out in the name or on behalf or for the State Secretary. A panel or tribunal, by whatever name called, instituted by the State Government is amenable to the office of the State Secretary under the State Constitution. In the instant case, it is not correct to say that a panel, Panel Penyelaras Penilaian Prestasi dan Pergerakan Gaji (or Panel on the Coordination of Performance Appraisal and Salary Progression) set up for the purpose of the implementation of the Service Circular No 4/92, is absolutely independent of the the State Secretary.

The brief facts of the case are as follows.

The plaintiff was appointed on 6 February 1978 as a Water Engineer with the Public Works Department, on grade A18. On 1 February 1993 he was promoted and transferred to Kuching Rural District Council (later known as Padawan Municipal Council) on grade A11. Under the New Remuneration Scheme, the post was converted to J2.

Under the Service Circular No 4/92, the plaintiff as a council engineer, was informed of a static salary for the years of 1993, 1994 and 1995. The head of the department was the first defendant, who holds grade N2 which grade is equivalent to the plaintiff's J2 grade. A panel that reviewed the plaintiff's grievance was conducted by the second and third defendants, who are invariably of no higher grade than the plaintiff.

On 31 January 1996, the plaintiff called on the State Secretary, who promised that he would look into the matter and that he would institute an inquiry into the matter. Evidently, nothing of the sort seems to have materialised. It appears to be just lip service and nothing else (see affidavit in opposition of Chen Chi Yong affirmed on 25 November 1997). A public officer who promises to look into the matter raised by another, and has no intention of so doing, and does not do it, has committed an act of hypocrisy. This act does not stem from any manipulative strain of his personality. Rather it arose from an eagerness to sweep things under the rug.

In the affidavit dated 23 October 1997 in support of the summons in chambers of 25 November 1997, Hj Zakaria stated that there was no such post as the Chairman Panel on the Coordination of Performance Appraisal and Salary Progression, but there were at least 15 panels established in the State. However, he did not indicate which of the panels was relevant to this case. All departments at ministerial, divisional or local government levels are either directly or indirectly under the office of the Chief Minister's, and under the supervision or control of the State Secretary. The Human Relations Management Department is no different, and Hj Zakaria, the Director of the Department, is under the State Secretary. It is incumbent upon the Director of Human Relations Management Department acting for the State Secretary to name the correct panel that deal with the issue raised. Thus, Hj Zakaria's affidavit is patently unclear and ambiguous to a degree that no one could understand what exactly he meant, relevant to the issue, which he knows or ought to have known.

Earlier on, the plaintiff on 12 November 1994, wrote to the Panel Penyelaras Penilaian Prestasi dan Pergerakan Gaji regarding this matter ('exh CCY5') and received a reply on 13 March 1995 ('exh CCY6') which states as follows:

Jabatan Ketua Menteri
(Bahagian Pembangunan Sumber Manusia dan Personel),
Tingkat 18, Telefon Am: 082-441957
Wisma Bapa Malaysia, Kawat: SUK KUCHING
Petra Jaya, Teleks: HIDMAT MA 70091
93502 Kuching, Fax: 082-445618, 448214
Sarawak.

SULIT

Ruj. Kami: 34/C/EO/284/1
Tarikh: 13 Mac 1995

Encik Chen Chi Yong,
Melalui: Setiausaha,
Majlis Daerah Luar Bandar Kuching,
Kota Padawan
10th Mile Penrissen Road,
93250 Kuching.

Tuan,
Rayuan Mengenai Pergerakan dan Gaji Tahun 1993
Yang Diputuskan Statik oleh PPG

Adalah saya dengan segala hormatnya merujuk kepada surat tuan bertarikh 12 November 1994 mengenai perkara tersebut di atas.

Berhubung dengan itu, dimaklumkan bahawa PPG Khas bagi Kuasa-Kuasa Tempatan pada 10 Februari 1995 telah meneliti rayuan tuan dan mengekalkan pergerakan gaji tuan bagi tahun 1993 secara statik atas sebab penilaian itu adalah teratur dan objektif.

Sekian, harap maklum.

BERSATU BERUSAHA BERBAKTI

Yang ikhlas,

(tt)

(ABDUL RASHID BIN HAJI AZIZ)
Pengarah Pembangunan Sumber Manusia dan Personel
bp Pem Setiausaha Kerajaan,
Sarawak.

The plaintiff's counsel wrote to the Director of Human Relations Management Department of the Chief Minister's Office, who replied on 7 August 1997 ('exh CCY4') which states as follows:

Jabatan Ketua Menteri
(Bahagian Pengurusan Sumber Manusia)
(Bahagian Pembangunan Sumber Manusia),
(Bahagian Kualiti dan Audit Sumber Manusia),
Tingkat 10 dan 11, Telefon Am: 082-441957

A

Wisma Bapa Malaysia,
Petra Jaya,
93502 Kuching,
Sarawak.

Kawat: SUK KUCHING
Teleks: HIDMAT MA 70091
Faks: 082-445618, 448214 (HRM)
082-449079 (HRD)

B

Our Ref: 154/P/2451
Date: 7 August 1997
Lim & Lim Advocates,
Lot 418 (Ground & First Floors), Lorong 1,
Off Rubber Road,
93400 Kuching.

C

Dear Sir,
Application for Approval to Institute Legal Proceeding
Under Old GO 78(4) Or New GO 170(3)

I respectfully refer to your letter dated 20 July 1997 concerning the above mentioned subject and I am directed to inform you that the decision to award static increment to En Chen Chi Yong for three (3) consecutive years of 1993, 1994 and 1995 is final and will not be reviewed.

D

Thank you.

BERSATU BERUSAHA BERBAKTI

E

Yours faithfully,

(sgd)

(HAJI ZAKARIA P NYUMAY)
Director,
Human Relations Management Division,
for State Secretary,
Sarawak.
cc: State Secretary, Sarawak

F

It is clear that both these letters bear the Chief Minister's letterhead, and both signed by officers acting on behalf of the State Secretary. These letters seem to convey different messages in respect of the same subject from the same source, ie the State Secretary. Obviously, both cannot be correct.

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Further, in the affidavit in reply (undated), Hj Zakaria admitted in para 9 therein that CCY4 was a mistake. The letter CCY4 was signed by Hj Zakaria as Director of the Human Relations Management Department, for the State Secretary. Hj Zakaria knew or ought to have known of the contents of the letter CCY4. It has been said that the government is a trustee of the people and it is the duty of a trustee that he must act with exacta diligentia, ie the utmost diligence. There is no room for carelessness or indifference. As a senior government servant, Hj Zakaria ought to act honestly, and even more so if his act will adversely affect the career of another civil servant under him or in his department. It is unthinkable that as a senior officer and head of a department, he could possibly have committed such a blatant mistake or paid only lip service, doing nothing.

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I

It is a highly irregular and irresponsible act, which if allowed to persist, can cause administrative chaos in the administration of the Sarawak Government. In the light of the foregoing, Hj Zakaria appears to have uttered an untruth in his sworn affidavit. Whatever the intention or motive that he may have, it can only be ascertained at the proposed cross-examination.

For reasons as stated above, I allow the application of the plaintiff to cross-examine Hj Zakaria Nyumay on his affidavit. Costs of this application and of the cross-examination to the plaintiff in any event.

Application allowed.

Reported by Loo Lai Mee